TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 570

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED DECEMBER 5, 1939
CERTIORARI GRANTED JANUARY 8, 1940

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CALENDAR ENTRIES

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Feb. 3. Exemplification of record filed.
Feb. 4. Calendar praecipe filed.
Feb. 4. Proof of service filed.
Feb. 25. Motion to quash removal petition filed.
Feb. 26. Opinion filed.
Feb. 25. Notice of hearing filed.
Feb. 25. Petition for removal filed.
Feb. 25. Proof of service filed.
Mar. 29. Motion and notice of hearing filed.
Aug. 13. Affidavit opposing motion filed.
Sept. 2. Affidavit of O. P. M. Brown filed.
Oct. 18. Decision on motion filed.
Oct. 25. Brief in opposition to pending motion filed.
Nov. 22. Order

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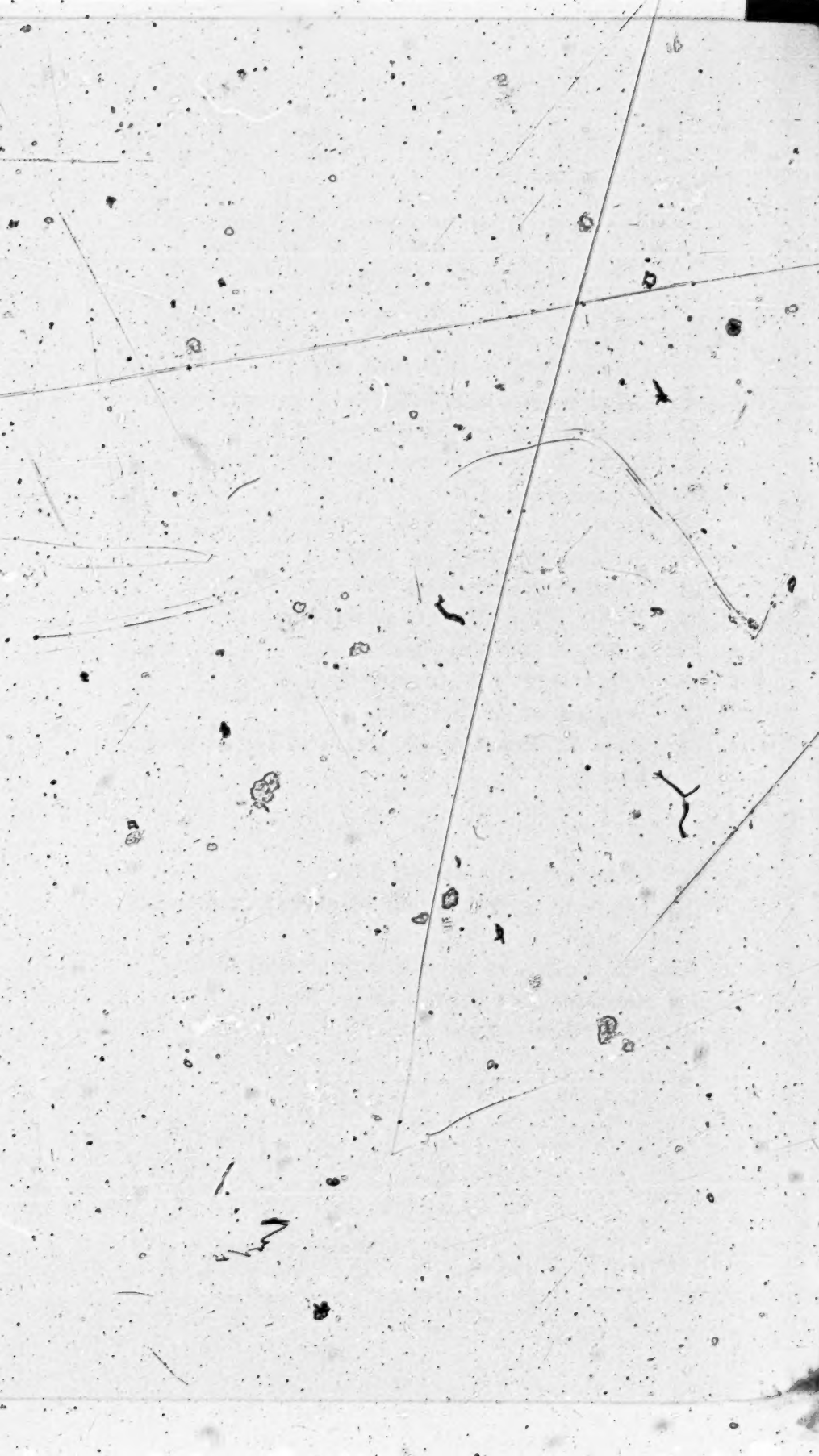
Feb. 8. Order granting appeal filed.
Feb. 18. Claim of appeal, proof of service and notice filed.
Mar. 10. Stipulation as to record on appeal filed.
Mar. 10. Certificate of Circuit Judge filed.
Mar. 10. Record on appeal filed.



STATE OF MICHIGAN

SUPREME COURT

Appeal from the Circuit Court for the County of St. Clair
Honorable Fred W. George, Circuit Judge

In re the Estate of SYDNEY C. McLOUTH,
Deceased.

UNITED STATES OF AMERICA,
Appellant in St. Clair County
Circuit Court,
Appellant herein,

v.

JOHN C. SHAW, Administrator de bonis non
of said Estate,
Appellee in St. Clair County
Circuit Court,
Appellee herein.

No. 1

RECORD ON APPEAL

JOHN C. LEHR,
United States Attorney,
PETER P. GILBERT,
Assistant United States Attorney,
829 Federal Building,
Detroit, Michigan,
OLIVER P. M. BROWN,
Special Assistant United States Attorney,
4223 Commerce Building,
Washington, D. C.,
Attorneys for Appellant.

STEWART & BLACK,
407-9 First National Bank Building,
Port Huron, Michigan,
EDWARD T. KANE,
Boynton Block,
Port Huron, Michigan,
Attorneys for Appellee.

STIPULATION AS TO RECORD ON APPEAL

(Filed March 10, 1939)

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the Record in the above entitled cause on appeal to the Supreme Court shall consist of:

1. This Stipulation.
2. Copy of Order of Supreme Court Allowing the Appeal, showing date of Order.
3. The List of Calendar and Journal Entries in the Cause.
4. Statement of Reasons and Grounds of Appeal.
5. Complete Record on Appeal from Probate Court as originally filed in the Circuit Court.
6. Calendar Praecipe and Notice of Hearing in Circuit Court.
7. Petition of this Appellant for Removal of Suit.
8. Notice of Hearing on Petition for Removal and Proof of Service of Notice.
9. Motion to Quash Removal Petition.
10. Stenographer's Transcript of Proceedings in Circuit Court.
11. Opinion of Circuit Judge filed February 26, 1938.
12. Journal Entry of Judgement affirming Probate Court Order as entered February 26, 1938, and Journal Entry of Nunc Pro Tunc Amendment entered February 28, 1938.
13. Motion to Set Aside Nunc Pro Tunc Amendment.

14. Decision of Circuit Judge on Motion to Set Aside Nunc Pro Tunc Amendment, as filed October 18, 1938.

15. Journal Entry of Order Granting Motion to Vacate Nunc Pro Tunc Amendment, as entered November 22, 1938.

16. Statement of Proceedings and Facts and Certificate of Circuit Judge thereto.

17. Claim of Appeal.

18. Notice of Appeal.

19. Certified Copy of Judge Lederle's Order for Remand.

20. Certificate of Circuit Court.

John C. Lehr,
United States Attorney.

By: Peter P. Gilbert,
Assistant United States Attorney,
Federal Building,
Detroit, Michigan.
Oliver P. M. Brown,
Special Assistant United States
Attorney,
No. 4221 Commerce Building,
Washington, D. C.,
Attorney for Appellant.
Stewart and Black,
407-9 First National Bank Building,
Port Huron, Michigan.
Edw. T. Kane,
Boynton Block,
Port Huron, Michigan,
Attorneys for Appellee.

ORDER GRANTING APPEAL

(Filed February 8, 1939)

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court room in the Capitol, in the City of Lansing, on the second day of February, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable Henry M. Butzel, Chief Justice; Howard Wiest, George E. Bushnell, Edward M. Sharpe, William W. Potter, Bert D. Chandler, Walter H. North, Thomas F. McAllister, Associate Justices.

In this cause an application is filed by appellant for leave to appeal from the judgment of the Circuit Court for the County of St. Clair, and nothing in opposition thereto having been filed by appellee, and due consideration thereof having been had by the Court, it is ordered that the application be and the same is hereby granted.

State of Michigan—ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 3rd day of February, in the year of our Lord one thousand nine hundred and thirty-nine.

Jay Mertz,
Clerk.

(Seal)

ORDER AFFIRMING PROBATE COURT ORDER OF DECEMBER 22, 1937

(Circuit Court Journal 27, Page 235).

At a General Term of the Circuit Court for the County of St. Clair, held at the Court House in the City of Port Huron, said County, on Saturday, February 26th, A. D. 1938.

Present: Honorable Fred W. George, Circuit Judge.

On finding by the Court that appellant has failed to prosecute the appeal herein, and on motion of appellee, it is adjudged that the Probate Court order of December 22, 1937, be and the same is hereby affirmed.

Thereupon court adjourned until Monday morning at 9:30 o'clock.

Read, approved and signed in open court this 28th day of February, A. D. 1938.

Fred W. George,
Circuit Judge.

REASONS AND GROUNDS OF APPEAL

(Filed .....)

And now comes the appellant, United States of America, by John C. Lehr, United States Attorney, Peter P. Gilbert, Assistant United States Attorney and Oliver P. M. Brown, Special Assistant United States Attorney, attorneys for appellant, at the direction of the Attorney General of the United States, and says that in the record and proceedings in said cause in the Circuit Court there is manifest error and the judgment therein, en-

tered by the Circuit Court for the County of St. Clair on the 26th day of February, A. D. 1938, is unjust to appellant, as follows:

1. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because said order and judgment deprives appellant of property rights without due process of law.

2. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because that special tribunal did not possess jurisdiction over the person of the United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) against whom the claim of set-off was exhibited by the Administrator.

3. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because the claim exhibited by the Administrator was for a balance due from a person other than the claimant-appellant.

4. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because that special tribunal did not possess jurisdiction over the subject matter.

5. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because the claim in off-set exhibited by the Administrator was barred by the statute of limitations.

6. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because no evidence was produced either before said Probate Judge or in the Circuit Court, to prove that the claim in off-set exhibited by the Administrator was an existing contractual obligation of the United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) on the date Section 203, (U. S. Code, Title 46, Section 1113). Merchant Marine Act, 1936, (49 Stat. 1985) became effective.

7. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because that special tribunal did not possess jurisdiction to enter any affirmative judgment against this appellant.

And for the errors aforesaid appellant says that the judgment entered in said cause ought to be reversed, vacated and held for naught.

John C. Lehr,
United States Attorney.

By: Peter P. Gilbert,
Assistant United States Attorney,
Federal Building,
Detroit, Michigan.

Oliver P. M. Brown,
Special Assistant United States Attorney,
No. 4221, Commerce Building,
Washington, D. C.

PROOF OF SERVICE.

(Filed February 4, 1938)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of Sydney C. McLouth, Deceased.

County of St. Clair—ss.

Peter P. Gilbert, being duly sworn, says:

I served upon Eugene F. Black, one of the members of the firm of Stewart & Black, attorneys, a copy of the order, of which the foregoing and annexed is a true copy, on the 31st day of January, A. D. 1938, at the City of Port Huron, in said county, by delivering the same to Eugene F. Black personally.

Further, that on the 3rd day of February, A. D. 1938, I served a copy of the order upon John C. Shaw, Administrator of the Estate of Sydney C. McLough, Deceased, by delivering the same to John C. Shaw personally, at the City of Detroit, Wayne County, Michigan.

Peter P. Gilbert.

Subscribed and sworn to before me this 4th day of February, A. D. 1938.

John C. Ray,
Notary Public, Wayne County, Michigan.
My commission expires February 3, 1941.

PETITION FOR ALLOWANCE OF BALANCE DUE ESTATE ON SET-OFF AGAINST CLAIM OF UNITED STATES OF AMERICA

(Filed .....)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

Comes now John C. Shaw, administrator de bonis non of said estate, and gives unto this Honorable Court to be advised and informed as follows:

1. That on or about the 14th day of November, 1935, this Court, acting by statute in the place and stead of Commissioners on Claims, entered an order in this proceeding allowing, as a claim of the third class, a claim of United States of America against said estate in the sum of $40,165.40, plus interest thereon at 5% per annum from April 25, 1933, and disallowing the estate's pleaded set-off against said claim, which set-off was and is based upon this Court's order of October 13, 1932, allowing in full the claim of Ingram-Day Lumber Company in the sum of $58,089.04. Said order of November 14, 1935, is a part of this Court's file in the matter of this proceeding and reference thereto is hereby made.

2. That on or about the 8th day of February 1937, by judgment of the Circuit Court for said County and State, duly entered an appeal therefrom, said order of November 14, 1935, was duly reversed. A certified copy

of said judgment is herewith filed as and for due remand of the appeal to this Court.

3. That on or about September 1, 1937, by judgment of the Supreme Court of said State, duly entered on appeal therefrom as shown by Volume 281 of Michigan Official Reports, said Circuit Court judgment was duly affirmed.

4. That by such judgment of said Circuit Court the estate's set-off as pleaded against said claim was duly adjudged and adjudicated to be the just and proper obligation owing to said estate by United States Shipping Board Emergency Fleet Corporation (Name changed to United States Shipping Board Merchant Fleet Corporation by Act of February 11, 1927, 46 U. S. C. A. 810), and as such that it was a proper set-off, within the meaning of Compiler's Section 15682 of the Michigan Compiled Laws of 1929, to said claim of United States of America, and petitioners allege that it is the consequent duty of said Court order said last mentioned statute to ascertain and duly allow, in favor of said estate and against said claimant United States of America, the balance in favor of said estate representing excess of such adjudicated set-off over and above such claim of United States of America, especially considering the provisions of the Federal Merchant Marine Act of 1936, by the terms of which all obligations of said Fleet Corporation were unequivocally assumed by said claimant United States of America.

* * * * *

Considering the premises, petitioner prays that this Court, acting in the place and stead of Commissioners of Claims and in pursuance of the mandatory provisions of Compiler's Section 15682 of the Michigan Compiled

Laws of 1929, grant statutory judgment of allowance, against United States of America and in favor of said estate, of the existing balance due said estate, on account of its adjudicated counter cause of action, over and above said claim of United States of America.

John C. Shaw, Administrator
de bonis non of the Estate of
Sydney C. McLouth, Deceased.
By: Eugene F. Black,
Attorney and Agent.

State of Michigan,
County of St. Clair—ss.

On this 20th day of November, 1937, before me, a Notary Public in and for said County, personally appeared the above named Eugene F. Black, who executed the foregoing petition in my presence, who made oath that he has read same, that he knows the contents thereof and that the statements therein contained are true of his own knowledge, and who made further oath in my presence that he is duly authorized to execute said petition for and in behalf of said petitioner, and that he executes same for the reason that the facts and statements therein alleged are within his knowledge and are not within the personal knowledge of said petitioner.

Sally Montgomery,
Notary Public, St. Clair, County, Michigan.
My commission expires 5/20/39.

Stewart & Black,
Attorneys for Administrator,
407-9 First Nat'l. Bank Bldg.,
Port Huron, Michigan.

NOTICE OF HEARING ON PETITION

(Filed .....)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

To: John C. Lehr,
United States District Attorney,
Eastern District of Michigan.

Take notice that the within and attached petition will be brought on for hearing before said Court on Monday, December 6, 1937, at 2:00 o'clock P. M.

Yours, etc.,

Stewart & Black,
Attorneys for Administrator,
407-9 First Nat'l. Bank Bldg.,
Port Huron, Michigan.

Dated: November 20, 1937.

ORDER DISALLOWING CLAIM OF UNITED STATES OF AMERICA

(Filed .....)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

At a session of said Court held at the Court House in the City of Port Huron, St. Clair County, Michigan, on December 22nd, 1937.

Present: Hon. Clair R. Black, Judge of Probate.

Stewart and Black appearing for Administrator and Petitioner.

Peter P. Gilbert, Assistant United States District Attorney appearing for the United States Government.

Petition for allowance of balance due estate on set-off against the claim of United States of America.

OPINION AND ORDER

This petition presents but one question, namely, Does this Court have jurisdiction to grant a judgment against the Government where the off-set exceeds the Government's claim, or in allowing the off-set does it merely extinguish the Government's claim?

On September 1, 1937, the Supreme Court upheld the Circuit Court of this County in directing disallowance in full of the claim of United States of America against said estate. In doing so, the Supreme Court determined that this Court had jurisdiction to hear and determine the set-off which was exhibited against said claim and adjudicated that such set-off was an obligation of United States Shipping Board Merchant Fleet Corporation owing to the deceased which was properly assertable in offset. In re McLouth's Estate, 281 Mich, 191.

The proceeding is now in this Court on remand for entry of order disallowing the Government's claim and for further proceedings not inconsistent with the aforesaid rulings of the Circuit and Supreme Courts. On such remand John C. Shaw, administrator of said estate, filed petition for ascertainment and allowance under Section 15682 of the Compiled Laws of Michigan, of the balance owing the estate on its adjudicated set-off. The petition was duly brought to hearing and it is resisted by the United States, represented by the District Attorney's office in Detroit, on the sole ground that this Court is without jurisdiction to grant an affirmative judgment against the Government under the rule of United States v. Eckford, 73 U. S. 484, United States v. Nipissing Mines Co., 206 Fed. (C. C. A.) 431, and similar cases.

The amount of the set-off so adjudicated is not shown by the Supreme Court's opinion but it fully appears in the records of this Court. On October 13, 1932, this Court duly allowed against the estate the claim of Ingram-Day Lumber Company in the sum of $58,089.04. The amount of the claim represented the judgment of the United States Supreme Court (275 U. S. 471) in

the sum of $42,789.96, plus interest and taxable costs. Interest at the legal rate on the claim to December 8, 1937, amounts to $14,982.34 making a total of $73,071.38. The amount of the Government's claim was $40,165.40 on April 25, 1933, and interest at the legal rate thereon to December 8, 1937, amounts to $9,277.01 making a total of $49,442.41. The difference between the two items is $23,628.97, which is the amount due the estate.

Under Section 15682 of the Compiled Laws of Michigan, it is the duty of this Court, acting as Commissioners of Claims, to enter judgment ascertaining and allowing the balance of the meritorious set-off which exceeds a claim. Since the Government has directly assumed this contractual obligation of the Fleet Corporation by the Federal Merchant Marine Act of 1936, it is the consequent duty of this Court to ascertain and allow this balance in favor of the estate unless, as claimed by the Government, this Court is without jurisdiction to grant such judgment for the reason given above. On this point an examination of the cases cited by the Government shows that they clearly support the proposition that no Court may enter an affirmative judgment against the United States on a counter claim exceeding a claim of the Government. However, all such cases have been overruled by United States v. The Thekla, 266 U. S. 328, where it was held that voluntary entry into litigation by the Government submits it to the Court's general jurisdiction to enter affirmative judgments on counter claims. This change in the law was expressly noted and followed by the Court of Appeals in United States v. National City Bank, 83 Fed. (2) 236; 106 A. L. R. 1235, which is the leading authority cited by the Michigan Supreme Court in the McLouth case, supra. This Court, there-

fore, concludes that the United States of America, having submitted to the jurisdiction of this Court, this Court retains jurisdiction, and

It is therefore ordered and adjudged that the claim of the United States of America as filed against said estate be and the same is hereby disallowed in accordance with the judgments of the Circuit Court and the Supreme Court.

It is further ordered, adjudged and ascertained, in accordance with Section 15682 of the Compiled Laws of the State of Michigan, that United States of America is indebted to said estate in the sum of $23,628.97 as of December 8, 1937, and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America.

Clair R. Black,
Judge of Probate.

NOTICE OF AND APPLICATION FOR APPEAL FROM ORDER, ENTERED DECEMBER 22, 1937, DISALLOWING CLAIM OF UNITED STATES OF AMERICA AND ADJUDGING THAT UNITED STATES OF AMERICA IS INDEBTED TO ESTATE OF SYDNEY C. McLOUTH, DECEASED, IN THE SUM OF $23,628.97.

(Filed January 31, 1938)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

Comes now United States of America, by John C. Lehr, United States Attorney, at the direction of the Attorney General of the United States, and hereby gives notice of and applies for an appeal from the order of said court, acting as Commissioners of Claims, entered December 22, 1937, whereby the claim of United States of America against the Estate of Sydney C. McLouth, Deceased, was disallowed and whereby it was adjudged that United States of America is indebted to said estate in the sum of $23,628.97 as of December 8, 1937.

As reasons for such appeal, United States of America assigns the following:

1. The court does not possess jurisdiction to entertain or adjudicate any claim against the United States, whether asserted by way of recoupment, set-off, counterclaim or cross-bill.

2. Even if the court possesses jurisdiction to adjudicate that the claim asserted by said estate may be applied pro tanto to extinguish the judgment claim of United States of America against said estate, the court does not possess jurisdiction to enter a judgment against the United States of America for any amount, even though the court ascertains and determines that the claim of said estate exceeds in amount the claim proved by United States of America.

3. The claim asserted by said estate is a claim against the United States Shipping Board Merchant Fleet Corporation (formerly United States Shipping Board Emergency Fleet Corporation) which was a corporation organized under the laws of the District of Columbia, and a claim against said Corporation may not be set off against a judgment obtained by United States of America in its own right.

4. The claim of said estate against the United States Shipping Board Merchant Fleet Corporation (formerly United States Shipping Board Emergency Fleet Corporation), if it has a valid claim, is an unliquidated claim for breach of contract and no evidence has been submitted to this court, acting as Commissioners of Claims, and there is no evidence in the records of this court to prove that the United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) breached its contract nor that it is indebted to said estate in any sum whatsoever.

5. The decision of the Supreme Court of the United States in the case of Ingram-Day Lumber Company v. Sydney C. McLouth (275 U. S. 471), directing that a

judgment be entered against that defendant for $42,789.96, which judgment forms the basis of the counterclaim being asserted by said estate against United States of America in this proceedings, shows affirmatively that the claim sued upon by Ingram-Day Lumber Company arose out of a contract that was framed without reference to or knowledge of decedent's contract with the United States Shipping Board Emergency Fleet Corporation and that there was no proof that Ingram-Day Lumber Company's contract with decedent was either modified, suspended, cancelled or requisitioned by the United States Shipping Board Emergency Fleet Corporation or by United States of America, from which affirmative showing it necessarily follows that United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) was under no contractual or other legal obligation to indemnify decedent McLouth or his said estate against the Ingram-Day Lumber Company judgment.

6. Even if the court possessed jurisdiction to make its order and even though the court did not err in determining that United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) breached its contract, the court erred by including interest on the Ingram-Day Lumber Company judgment as a part of the damages for the supposed breach of contract, because the estate's cause of action (if any) against said Fleet Corporation accrued on January 3, 1928, when the United States Supreme Court directed a judgment against McLouth and it is inequitable that said Fleet

Corporation or the United States should be held liable for interest accumulated by reason of laches on the part of the Administrator.

United States of America.
By: John C. Lehr,
United States Attorney, and
By: Peter P. Gilbert,
Assistant United States Attorney.

Dated: January 29, 1938.

State of Michigan,
County of Wayne—ss.

Peter P. Gilbert being first duly sworn, deposes and says that he is an Assistant United States Attorney for the Eastern District of Michigan, and has charge of the claim of and is attorney for the United States of America, and is familiar with the issues involved in said claim, as set forth in the notice of and application for an appeal, and that the report of the Commissioner on Claims in this matter is not in accordance with the just rights of said appellant, as deponent verily believes.

Peter P. Gilbert.

Subscribed and sworn to before me this 29th day of January, A. D. 1938.

John W. Babcock,
Notary Public, Wayne County, Michigan.
My commission expires October 26, 1940.

BOND ON APPEAL FROM THE DECISION OF COMMISSIONER OF CLAIMS

(Filed.....)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

Know all men by these presents, that we, the United States of America by John C. Lehr, United States Attorney for the Eastern District of Michigan, as principal and Continental Casualty Company, an Indiana corporation, as surety, within the State of Michigan, are held and firmly bound and obliged unto John C. Shaw, Administrator of the Estate of Sydney C. McLouth, Deceased, being the adverse party; in the full sum two hundred ($200.00) dollars, lawful money of the United States of America, to be paid to the said John C. Shaw, Administrator of the Estate of Sydney C. McLouth, Deceased, or to his certain attorney, heirs, executors, administrators or assigns, to the true payment whereof we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals this 29th day of January, A. D. 1938.

The condition of this obligation is such, that if the above bounden, the United States of America, by John C. Lehr, United States Attorney for the Eastern District of Michigan, claimant against said estate, who has made and filed an application for an appeal to the Cir-

cuit Court for said county from the decision of the Commissioner appointed to receive, examine and adjust all claims and demands against said deceased, disallowing the claim of the United States of America against the Estate of Sydney C. McLouth, Deceased, and whereby it was adjudged that the United States of America is indebted to the said Estate of Sydney C. McLouth, Deceased, in the sum of twenty-three thousand, six hundred twenty-eight and 97/100 ($23,628.97) dollars, as of December 8, 1937, shall diligently prosecute said appeal to effect, and pay all damages and costs which may be awarded against the United States of America on such appeal, then this obligation to be void and of no effect, otherwise to remain in full force and virtue.

(Signed) John C. Lehr. L. S.

Continental Casualty Co.
By: U. A. Peters, L. S.
Attorney in fact.

I have examined and duly approve the foregoing bond this 31st day of January, A. D. 1938.

(Signed) Clair R. Black,
Judge of Probate.

ORDER ALLOWING APPEAL FROM DECISION OF COMMISSIONER ON CLAIMS

(Filed.....)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of Sydney C. McLouth, Deceased.

At a session of said court, held at the Probate Office in the City of Port Huron, in said county, on the 31st day of January, A. D. 1938.

Present: Honorable Clair R. Black, Judge of Probate.

The United States of America, by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Peter P. Gilbert, Assistant United States Attorney for said district, having filed in this court a notice of and application for appeal to the Circuit Court for the said county from the report of the Commissioner on Claims filed December 22, 1937, whereby the claim of the United States of America against the Estate of Sydney C. McLouth, Deceased, was disallowed, and whereby it was adjudged that the United States of America is indebted to the Estate of Sydney C. McLouth, Deceased, in the sum of $23,628.97 as of December 8, 1937, and it appearing that the said appellant has given proper bond on such appeal, which has been duly approved and filed.

It is ordered that said appeal be, and the same is hereby allowed.

It is further ordered that notice of said appeal and hearing thereon in said Circuit Court be given by personal service of a certified copy of this order and application for appeal upon John C. Shaw, Administrator of said Estate, and upon Messrs. Stewart and Black, 407-9 First National Bank Building, Port Huron, Michigan, within fifteen (15) days from the date hereof.

(Signed) Clair R. Black,
Judge of Probate.

EXEMPLIFICATION OF RECORD

(Filed February 3, 1938)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

I, Mildred E. Wright, Registrar of the Probate Court for said County, do hereby certify that I have compared the foregoing copy of petition for allowance of balance due estate on set-off against U. S. claim notice of hearing, opinion and order, notice of appeal, bond on appeal, order granting appeal and directing notice, proof of service with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In testimony whereof, I have hereto set my hand and affixed the seal of the Probate Court, at Port Huron, this 3rd day of February, A. D. 1938.

Mildred E. Wright,
(Seal) Registrar of the Probate Court.

CALENDAR PRAECIPE

(Filed February 4, 1938)

To Joseph E. Vincent, Clerk of said Court:

Appeal from the Probate Court of said County having been duly perfected herein, place the cause on the calendar of the present term of this court.

Yours, etc.,

Stewart & Black,
Attorneys for Appellee,
407-9 First National Bank Bldg.,
Port Huron, Michigan.

Dated: February 3, 1938.

To: John C. Lehr, United States District Attorney,
Peter P. Gilbert, Assistant U. S. District Attorney,
Attorneys for Appellant,
Detroit, Michigan.

Take notice that this cause has been placed on the calendar of the present term of the Circuit Court for the County of St. Clair in accordance with the foregoing praecipe, and that on the 9th day of February, 1938, at the opening of court on that date, the said appellee, through his counsel, will appear before the presiding judge of said court and move that hearing and trial of said appeal be set for a day certain subsequent to 14 days from the date hereof.

Yours, etc.,

Stewart & Black,
Attorneys for Appellee.

February 3, 1938.

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MICHIGAN

(Filed February 25, 1938)

Your petitioner, United States of America, appears specially by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Peter P. Gilbert, Assistant United States Attorney for said district, at the direction of the Attorney General of the United States, for the sole purpose of filing this petition for removal, and for cause for removal of the above entitled suit from the Circuit Court for the County of St. Clair, State of Michigan, to the District Court of the United States for the Eastern District of Michigan, respectfully shows unto this Honorable Court:

1. Your petitioner is a corporation sovereign and is the defendant in the above entitled suit, which is of a civil nature, and the matter and amount in dispute in this suit exceed the sum or value of three thousand dollars, exclusive of interest and costs.

2. The said suit arises under the Constitution and laws of the United States, of which the district court of the United States are given original jurisdiction, that is, the suit arises under Section 8 of Article I, Section 2 of Article III, Article VI and the Seventh Amendment of the Constitution of the United States under the following statutes of the United States: Shipping Act, 1916 (39 Statutes at Large 728); Merchant Marine Act, 1920, (Ch. 250, 41 Statutes at Large 988); Merchant Marine Act, 1936, (Public No. 835—74th Congress); Shipping Fund Provisions, Act approved June 15, 1917,

(Ch. 29, 40 Statutes at Large 182); Section 3466 Revised Statutes. (Sec. 191, Title 31, U. S. Code); and Section 951, Revised Statutes, (Sec. 774, Title 28, U. S. Code).

3. The said suit is pending in this honorable court on your petitioner's appeal from an order entered by Honorable Clair R. Black, Judge of Probate for the County of St. Clair, Michigan, acting as Commissioners of Claims, under authority of Section 15682 of the Compiled Laws of Michigan, where, upon a petition filed by the attorney for John C. Shaw, Administrator de bonis non of the Estate of Sydney C. McLouth, Deceased, said Honorable Clair R. Black, Judge of Probate, acting as Commissioner of Claims, ordered, and adjudged that the claim of your petitioner against the said estate be disallowed and ordered, adjudged and ascertained that your petitioner is indebted to said estate in the sum of $23,628.97 as of December 8, 1937.

4. That said administrator, plaintiff-appellee herein, has filed no pleading in this honorable court setting forth his cause of action against your petitioner, but said administrator's petition filed in the Probate Court of St. Clair County, on which petition the Honorable Clair R. Black, Judge of Probate of said Court, acting as Commissioner on Claims, entered his order, as aforesaid, and which is contained in the transcript of record on appeal certified to this honorable court, alleged:

That on or about the 14th day of November, 1935, the said Probate Court, acting by statute in the place and stead of Commissioners on Claims, entered an order in this proceeding alleging as a claim of the third class, a claim of the United States of America against said estate in the sum of $40,165.40 plus interest thereon at

5% per annum from April 25, 1933, and disallowing the estate's pleaded set-off against said claim, which set-off was and is based upon said Probate Court's order of October 13, 1932, allowing in full the claim of Ingram Day Lumber Company in the sum of $58,089.04; that on or about the 8th day of February, 1937, by judgment on appeal of this honorable court the said order of said Probate Court of November 14, 1935, was duly reversed; that on or about September 1, 1937, by judgment on appeal of the Supreme Court of Michigan the said judgment of this Honorable Court was affirmed; that by said judgment on appeal in this honorable court the estate's set-off was adjudged to be a just and proper obligation owing to said estate by the United States Shipping Board Emergency Fleet Corporation, which corporation's name was changed to United States Shipping Board Merchant Fleet Corporation by Act of February 11, 1927, (46 U. S. Code 810) and as such it was a proper set-off to said claim of your petitioner; that it was the duty of the said Probate Court to ascertain and duly allow, in favor of said estate and against your petitioner, the balance in favor of said estate representing excess of such additional set-off against United States Shipping Board Merchant Fleet Corporation over and above said claim of your petitioner, "especially considering the provisions of the Federal Merchant Marine Act of 1936, by the terms of which all obligations of said Fleet Corporation were unequivocally assumed by said claimant United States of America." The said petition filed by the counsel for said administrator prayed that said Probate Court, acting in the place and stead of Commissioners on Claims, grant statutory judgment of allowance against your petitioner and in favor of said estate of the existing balance due said estate on account of its adjudicated

counter-cause of action, over and above said claim of your petitioner.

5. After said petition was filed by counsel for said administrator and before said order of said Honorable Clair R. Black, Judge of Probate, acting as Commissioners on Claims, was ordered thereon, your petitioner, acting through the United States Attorney for the Eastern District of Michigan, appeared and made seasonable objections to granting the relief against your petitioner prayed in the administrator's said petition, but said Honorable Clair R. Black, Judge of Probate, acting as Commissioners on Claims, overruled your petitioner's objections.

6. Your petitioner denies that it or the said Fleet Corporation is indebted to the plaintiff herein or to the Estate of Sydney C. McLouth, Deceased, in the sum of $23,628.97, or in any other sum, and states that the facts alleged in the administrator's said petition do not constitute a good cause of action against your petitioner, and your petitioner says that under the Constitution and laws of the United States, particularly the laws referred to in Paragraph 2 of this Petition, and under which this suit arises, your Petitioner has a good defense to plaintiff's suit.

7. Your petitioner's appeal from said order of said Honorable Clair R. Black, Judge of Probate, acting as Commissioners of Claims, was filed in this honorable court on the 31st day of January, 1938, and under the laws of the State of Michigan and the rules of, and practice in, this honorable court, your petitioner, on such appeal, is not required to file any plea, answer or demurrer, to said petition filed by the administrator as aforesaid, and at all events the filing of this petition for removal is within the time limited for filing a petition

for removal as prescribed in Title 28, Section 72, United States Code.

8. Your petitioner presents herewith a bond conditioned that it will enter into the District Court of the United States for the Eastern Disrict of Michigan, Southern Division, within thirty days from the date of the filing of this petition a certified copy of the record in this suit, and that it will pay all costs that may be awarded by the said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto.

9. That prior to the filing of this petition and of said bond for the removal of this cause, written notice of intention to file the same was given by your petitioner to Messrs. Stewart and Black, attorneys for the Estate of Sydney C. McLouth, as required by law, a true copy of which motion, with proof of service of the same, is attached hereto.

Wherefore, your petitioner prays that the said bond may be accepted as good and sufficient, and that this court will make its order for the removal of said cause to the United States District Court for the Eastern District of Michigan, Southern Division, and cause the Clerk of this Court to make up a record in said cause for transmission to said District Court, and that no other or further proceedings may be had or taken in said cause in this Court.

John C. Lehr,
United States Attorney.

(Sgd.) Peter P. Gilbert,
Assistant United States Attorney.

Oliver P. M. Brown,
Special Assistant United States Attorney.

(Sgd.) Max O'Rell Truitt,
General Counsel,
United States Maritime Commission,
Of Counsel.

Dated: February 24, 1938.

State of Michigan,
County of Wayne—ss.

On this 24th day of February, 1938, before me, a notary public in and for said county, personally appeared Peter P. Gilbert who signed the foregoing petition in my presence and who made oath that he has read same, that he knows the contents thereof; that the statements contained therein are true of his own knowledge; that he is an assistant United States Attorney for the Eastern District of Michigan, and is duly authorized to sign and verify said petition for and in behalf of the petitioner, and that he makes this affidavit for the reason that petitioner is a corporation sovereign.

Sally Montgomery,
Notary Public, St. Clair County, Michigan.
My commission expires May 20, 1939.

(Seal)

NOTICE OF HEARING

(Filed February 25, 1938)

To: Stewart and Black,
408 First National Bank Building,
Port Huron, Michigan,
Attorneys for the Estate of
Sydney C. McLouth, Deceased:

Please take notice that the United States of America, defendant herein, by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Peter P. Gilbert, Assistant United States Attorney for said district, will, on Friday, February 23, 1938, at 9:30 o'clock in the forenoon, file in the above entitled court and cause its petition and bond for the removal of said cause from said court to the United States District Court for the Eastern District of Michigan, Southern Division, and will, at said time and place, or as soon thereafter as counsel may be heard, before Honorable Fred W. George, Circuit Judge, move said court for an order approving said petition and bond and removal of said cause to the United States District Court for the Eastern District of Michigan.

True copies of said petition, bond and proposed order are hereto attached.

John C. Lehr,
United States Attorney.
Peter P. Gilbert,
Assistant United States Attorney.

PROOF OF SERVICE BY MAIL

(Filed February 25, 1938)

United States of America,
Eastern District of Michigan—ss.

Gertrude Ogden being duly sworn, deposes and says that on the 21st day of February, A. D. 1938, she served true copies of the Petition for Removal, Bond for Removal, Order Removing Cause to United States District Court; and Notice of Hearing in the above entitled cause upon Messrs. Stewart and Black, 408 First National Bank Building, Port Huron, Michigan, attorneys for the Estate of Sydney C. McLouth, Deceased, by enclosing said true copies in an envelope, plainly addressed to the said attorneys, Messrs. Stewart and Black, 408 First National Bank Building, Port Huron, Michigan, postage thereon prepaid, and depositing the same in the United States mail chute in the Federal Building in the City of Detroit, Michigan.

Further deponent saith not.

Gertrude Ogden.

Subscribed and sworn to before me this 24th day of February, A. D. 1938.

John W. Babcock,
Notary Public, Wayne County, Michigan.
My commission expires October 26, 1940.

MOTION TO QUASH REMOVAL PETITION

(Filed February 25, 1938)

Comes now the said appellee, by Stewart & Black, his attorneys, and says that the petition for removal of this cause, as filed herein on February 23, 1938, is legally insufficient for the following reasons:

1. The petition is late, the cause having been tried in the Probate Court; reviewed and remanded by the Circuit Court (the judgment of which was duly affirmed by the Supreme Court); tried in the Probate Court on the issue left open for determination on remand; appealed by petitioner (appellant) to this Court from determination of such issue, and such last appeal having been duly placed upon the calendar and set for hearing in accordance with the provisions of Section 14256 of the Compiled Laws of 1929 of the State of Michigan;

2. The issue before the Court does not arise primarily under the Constitution or laws of the United States, but arises under a local statute, Section 15682 of the Compiled Laws of 1929 of the State of Michigan, and the voluntary submission by petitioner to the jurisdiction of said Probate Court by and through the filing and prosecution of its now disallowed claim against said estate;

3. The District Courts of the United States have never at any time had original jurisdiction to entertain a suit by said estate or its representatives upon the now adjudicated countercause of action of the estate against petitioner, and the question of

whether the estate is entitled to statutory allowance and ascertainment of the excess thereof over petitioners said claim is the only issue before this court for review;

and accordingly moves for entry of an order quashing the same.

This motion is based upon the files and records of this court and upon the opinion and judgment of the Supreme Court of Michigan as shown by Volume 281 of the Michigan Official Reports on pages 191 et seq.

(Signed) Stewart & Black,
Attorneys for Appellee,
Business Address:
407-9 First National Bk. Bldg.,
Port Huron, Michigan.

Dated: February 24, 1938.

TRANSCRIPT OF TESTIMONY

STATE OF MICHIGAN—In the Circuit Court for the County of St. Clair.

Before Hon. Fred W. George, Circuit Judge

In the Matter of the Estate of Sydney C. McLouth, Deceased. } No. 399-17.

February 25, 1938.
Port Huron, Michigan.

Appearances: Messrs. Brown and Gilbert, for the United States of America; Messrs. Stewart and Black, for the Estate:

Reported by Chester G. Holdefer, Official Reporter, 31st Judicial Circuit.

The Court: The Court is presented with two problems; the petition for removal to the District Court of the United States for Eastern Michigan, and also the question of continuance.

The Court is of the opinion, and finds, that the petition of the United States Government is insufficient on its face to warrant the Court in granting its petition for removal.

The next question for the Court's consideration is the question of the motion for continuance. This is an appeal from the Probate Court had some time ago. The case was set for hearing. The Court set aside other matters so that it could be heard today. The motion for continuance as stated by counsel for the government is for the purpose of taking depositions of one or more witnesses who live without the jurisdiction of this court. If that is the only purpose for continuance, the Court will grant it. If not, the Court will proceed with the trial.

Mr. Gilbert: Does your Honor have a copy of the transcript from the Probate Court, setting forth the reasons of the Court's decision?

The Court: Why, I have it here. "Notice of and application for appeal from order entered December 22, 1937, disallowing claim of United States of America and adjudging that the United States of America is indebted to Estate of Sydney C. McLouth, Deceased, in the sum of $23,628.97."—You do not need to take this, Mr. Reporter.

(The Court reads transcript indicated.)

Mr. Gilbert: Does your Honor also have the report of the Commissioner on Claims granting the estate relief to the extent of $23,000.00?

Mr. Black: That is the photographic portion of it, I believe, your Honor.

(The Court reads the Opinion and Order of the Probate Court.)

Mr. Gilbert: Now, we claim we have the right to go into every phase of the Commissioner's Report and to the case on appeal. The case Mr. Black cited, In Re Reid's Estate, reading the syllabus: (Mr. Gilbert reads citation.)

That is the point we are raising here. We have this point No. 4 raised in our reasons for appeal and that requires the taking of additional testimony or having a deposition taken. On that particular point we are entitled to a continuance because of the fact that your Honor has ruled against us in this transfer.

The Court: Of course, the Court did say that you had lots of time in which to take it, but I also said if those were your reasons and you want to take those depositions, and they are your only reasons, I would be glad to grant it.

Mr. Gilbert: There is no way I can answer that.

The Court: You have to have some reason for your motion for continuance, and if that is the real reason or only reason, I will grant you that continuance.

Mr. Brown: I might add to what Mr. Gilbert has said, that as soon as we took this appeal I started to try to find these witnesses whose testimony I wanted to produce either in this Court or the Federal Court, because whether we try it here or the Federal Court, we have to have this testimony. My only source of information was the old personal files and these men have been out of our service eighteen years, and I started to correspond with our representatives and it is only within the last three or four days I have been able to find where these men are. I haven't been able to interview them, and the reasons why we didn't go to the expense of bringing them here at tremendous expense was because we had no way of knowing what your Honor's ruling might be on our motion to remove. It would have been foolish for us to have brought witnesses here when we had the motion to remove, with the expectation that your Honor might grant, and that is the reason I am not ready to go to trial.

Now, as to whether I have any concealed reason; all I can say is that both Mr. Gilbert and myself are representatives of the Department of Justice. We are subject to the orders of our superiors, and what they may decide shall be done with this case after they are apprised with your Honor's refusal, we are not able to say. We have to get instructions, but certainly no harm can be done if a reasonable continuance is allowed and allow us to take depositions, because whether we use them in this court or the Federal Court, in any event we have to produce these witnesses who dealt with these

transactions at the time. I might say that one of the witnesses is the witness, Liebrand, who your Honor will recall wrote a letter in which he referred to the commitments to McLouth. The other is a man by the name of VanFleck, who is Assistant Adjuster. Now, both of those men have been located in New York City and I expect to take their testimony. I thought I might make the suggestion as to the length of continuance, I would suggest two weeks, at your Honor's convenience or whatever your Honor wants to set it.

Mr. Black: Your Honor, I have a plan that I think will take care of everybody's rights.

The Court: That's fine, let's have it.

Mr. Black: Mr. Brown refuses to meet your Honor's conditions to the continuance he asks for. Accordingly, I move that the Court take the testimony on the appeal at this time that I propose to offer. It won't take more than two or three minutes to do it; take the case under advisement with the understanding that Mr. Brown, if he wants to within thirty days from today, may move for a re-opening of the proof to put in these depositions he wants to put in, and they will be received, if he wants to make such a motion at that time. That takes care of counsel's desire to put in further proof and it will also stop this little game of getting a continuance, as I see it, for the purpose of getting an injunction.

Mr. Brown: You will recall when we were before your Honor before, we had the situation where Mr. Black wanted a continuance to get further proof from the Government at Washington, and after discussion we agreed that he should have a reasonable time. Meanwhile, the Court held the case open. Now, I have no objection to his putting the proof in and holding the case open until we come in, and limit us to a time, if

you like, but meantime the Court will not decide the issue until we have the opportunity to put in our proof.

Mr. Black: I might say that you cannot enjoin the Court itself, and all I want to do is to have this Court take the proof and take the case under advisement, and hold it open for a motion to re-open the proofs by you to submit this additional proof you want. I call that to particular attention that I want this Court to take the case under advisement right now so that an injunction cannot be administered, because counsel won't and cannot affect in any way procedure by this Court once the case is taken under advisement. In other words, I want to know that this continuance is not for the thing that I suspect. If that is not the purpose of it, counsel are taken care of.

Mr. Brown: We certainly object.

Mr. Black: Counsel are taken care of perfectly by my suggestion if they want to put further proof in, in good faith on the merits of this case. I think their point No. 4 has been adjudicated by the Supreme Court of Michigan, but if they have some further proof, relevant and competent to the issue, that is met.

The Court: You haven't any serious objection to that?

Mr. Brown: We object to the case being submitted. We say hold the case open and let them put on their proof and hold the case open until we have a chance to bring our testimony here and limit us as to time.

The Court: If you can tell me that you want this adjournment for those depositions and bring in further testimony, I will give you thirty days stay right now.

Mr. Brown: I have already stated I cannot give you any assurance.

The Court: I will adopt Mr. Black's suggestion. When you want to put in that testimony, all you have to do is make that motion to put in that testimony and I will grant it.

Mr. Brown: Well, all we can say is that we think it is an abuse of discretion to tell us to go to trial now.

The Court: I don't think so, the case has been open for a long while.

Mr. Brown: So far as we are concerned, we retire from the case since your Honor will not grant us the continuance we ask for.

The Court: I will grant you an opportunity to move to re-open the case. I don't think that is any hardship and it may be somewhat of a protection to the other side.

Mr. Black: Then I offer myself as a witness on the hearing of the appeal.

Mr. Brown: We formally object to going ahead with the case at this time in view of our motion for continuance and our statement to the Court that we want the continuance for the purpose of producing testimony of non-resident witnesses; we protest against the condition the Court imposes that we make some statement that we are not going to take any other action, which is something that is beyond our control as officials of the Government. And we respectfully ask the permission of the Court to retire from the case at this point.

OPINION, SUBSTANCE OF JUDGMENT AND STATEMENT OF REASONS THEREFOR

(Filed February 26, 1938)

This is an appeal from an order of the Probate Court ascertaining and allowing the balance of a set-off over and above a claim presented against the estate by appellant. The set-off was upheld in Re McLouth's Estate, 281 Mich. 191, and the case was remanded by this Court to the Probate Court for denial of the claim and for determination of the question whether the estate was entitled to affirmative order allowing the liquidated balance of its set-off.

The appeal was regularly placed on the calendar and set for hearing on February 25th, after due notice to appellant. On the date set for hearing appellant appeared by O. P. M. Brown, special counsel, and Peter P. Gilbert, Assistant United States Attorney, and presented a petition to remove the cause. After hearing argument thereon, the court denied the petition as insufficient, and appellant moved for a continuance. Although the specified reason for continuance was need for desired depositions, the court is satisfied that the motion was actually made in order to obtain time to file an injunction bill in the District Court against appellee to restrain him from proceeding further with this appeal. The Government attorneys were offered a thirty-day continuance if they would assure the court that the sole purpose of the continuance was as specified. They refused such assurance and the court ordered the hearing to proceed. Appellant's attorneys thereupon announced their withdrawal from the hearing and left the

court room, and appellee moved for affirmance of the appealed Probate Court order.

The action and announcement of appellant's attorneys must be taken as decision not to prosecute the appeal and the motion for affirmance is therefore granted and the clerk is directed to enter judgment accordingly. Lest my position be misunderstood, however, I advise the District Attorney that he will be allowed a re-opening of the proofs and a new trial if he cares to apply for same within thirty days. I do not want it said that any party has been denied full right to submit proof before me, but I will not grant such a continuance when convinced that the purpose of same is ulterior.

In going over the records of this court in the main case I find omission on my part that should be corrected. When the Probate Court originally allowed appellant's claim against the estate it perforce did not pass on the question whether the estate should receive an affirmative order, ascertaining the excess of its set-off above such claim. When this court reviewed the Probate Court's allowance of such claim, it could not in turn pass on such question, the function of this court being purely appellate in Probate cases. The judgment of this court actually rendered and intended in addition to the record thereof as it appears, and which it was this court's duty to enter as a matter of course, was that such question be determined on remand by the Probate Court, the court of original jurisdiction. I find, however, on going over my opinion and judgment, that I used the customary form of reversal of an order allowing a claim and inadvertently omitted direction to decide such question. The Probate Judge and all parties to the cause have treated the judgment as leaving the ques-

tion of affirmative relief open for decision by the Probate Court on remand and an amendment is probably unnecessary, since the record as it now stands does not purport to determine the question one way or the other. However, this case is apparently on another long journey through the courts and the record should therefore definitely show what was actually intended and done so that neither party hereafter be in a position to claim that this court's original judgment settled the question of affirmative determination one way or another. On its own motion, therefore, and in accordance with its inherent powers, this court will amend the record of its judgment, nunc pro tunc as of February 8, 1937, so that there is added thereto direction to the Probate Court to take such further order as law and justice require, including determination of the question whether the estate is entitled to statutory allowance of the excess of its set-off over and above the amount of the disallowed claim.

(Signed) Fred W. George,
Circuit Judge.

February 26, 1938.

ORDER OF COURT AS ENTERED ON JOURNAL FEBRUARY 28, 1938 AND SIGNED MARCH 1, 1938.

(Title of Court and Cause)

On motion of the court it is ordered and adjudged that the record of the judgment entered in this cause on February 8, 1937, be and the same is hereby amended nunc pro tunc as of February 8, 1937, so that there is added thereto direction to the Probate Court to take such further order as law and justice shall require, including determination of the question whether the estate is entitled to statutory allowance of the excess of its set-off over and above the amount of the disallowed claim.

Read, approved and signed in open court this 1st day of March, A. D. 1938.

Fred W. George,
Circuit Judge.

MOTION TO SET ASIDE OPINION PERTAINING TO NUNC PRO TUNC ORDER

(Filed March 29, 1938)

Now comes the United States of America by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Peter P. Gilbert, Assistant United States Attorney for said district, and moves the court to set aside that portion of his opinion entered on February 26, 1938, pertaining to his nunc pro tunc order as of February 8, 1937, for the following reasons:

That the Court of his own motion amended the record of his judgment, nunc pro tunc as of February 8, 1937, so that there is added thereto direction to the Probate Court to take such further order as law and justice shall require, including determination of the question whether the estate is entitled to statutory allowance of the excess of its set-off over and above the amount of the disallowed claim.

That this Court was without jurisdiction to enter said order nunc pro tunc as of February 8, 1937, because:

1. The Court in said order is attempting to make it appear of record that the "suit" by the Administrator against the United States is only an incident of or supplement to the former proceedings in this court.

2. Section 13945 Compiled Laws of the State of Michigan for the year 1929, states that county circuit courts are required to hold at least four terms of court each year. In this cause several terms have intervened since the former order was entered on February 8, 1937. This Court, therefore, possesses no plenary jurisdiction over its former judgment and may make only such amendments as are permitted by the Michigan statute of amendments (Section 14148 et seq.).

3. Before the error in this cause could have been corrected, if it were susceptible of correction by amendment, it was necessary that the parties to be affected by it should have been cited before this court. It was also necessary that the parties affected by this order should have had an opportunity to be heard.

4. Because it was made after the term and without notice to the United States of America, it is clearly prejudicial to the interests of the United States.

5. In said opinion the Court stated that he "inadvertently omitted direction" to the Probate Court to decide the question of giving the Administrator a judgment for excess of the set-off over the Government's claim. This was in error because Mr. Black, counsel for Administrator, expressly disclaimed any right to an affirmative judgment against the United States (page 253, Printed Record). Mr. Black stated,

> "That set-off amounts to some $56,000 and of course, under the law we make no claim that we are entitled to an excess judgment against the government. We recognize that although our set-off, which we are pleading and submitting to the court here, exceeds the government's claim in this case, that all we can do is to extinguish the government's claim. In other words, although we might have twice as much coming on our set-off which the court might recognize, we concede all we can do is to apply enough of that set-off toward extinguishment of the government's claim. That appears to be the law and I concede it to be so, as I say."

In the Court's opinion of February 8, 1937, he stated,

> "Judgment will be entered on the date hereof reversing the order of the Probate Court and remanding the case to that court with direction to disallow the instant claim in full. The usual twenty day stay of proceedings pending appeal is granted."

This motion is based upon the files and records of said cause and upon the affidavit of Peter P. Gilbert hereto annexed.

John C. Lehr,
United States Attorney.
Peter P. Gilbert,
Assistant United States Attorney.

State of Michigan,
County of Wayne—ss.

Peter P. Gilbert being duly sworn, deposes and says that he is an Assistant United States Attorney for the Eastern District of Michigan, and is in charge, together with O. P. M. Brown of Washington, D. C., of said cause; that he has read the opinion of the Honorable Fred W. George, Circuit Judge for St. Clair County, dated February 26, 1938, in which opinion there is recited, "On its own motion, therefore, and in accordance with its inherent powers, this court will amend the record of its judgment, nunc pro tunc as of February 8, 1937, so that there is added thereto direction to the Probate Court to take such further order as law and justice shall require, including determination of the question whether the estate is entitled to statutory allowance of the excess of its set-off over and above the amount of the disallowed claim."

Deponent further states that he is familiar with Section 13945 Compiled Laws of the State of Michigan for the year 1929, which recites that county circuit courts are required to hold at least four terms of court each year.

Deponent further says that several terms of court have intervened since the order of February 8, 1937, was entered.

Deponent further says that he has read the Printed Record, especially page 253 in the Appeal from the Circuit Court to the Supreme Court of Michigan, in which counsel for the Administrator of said Estate, to-wit: Mr. Black, makes the following statement:

"That set-off amounts to some $56,000 and of course, under the law we make no claim that we are entitled to an excess judgment against the government. We recognize that although our set-off, which we are pleading and submitting to the court here, exceeds the government's claim in this case, that all we can do is to extinguish the government's claim. In other words, although we might have twice as much coming on our set-off which the court might recognize, we concede all we can do is to apply enough of that set-off toward extinguishment of the government's claim. That appears to be the law and I concede it to be so, as I say."

Deponent further says that he has read the opinion of this Honorable Court, in which he rendered his opinion against the claim of the Government, and has found that said opinion is concluded as follows:

"Judgment will be entered on the date hereof reversing the order of the Probate Court and remanding the case to that court with direction to disallow the instant claim in full. The usual twenty day stay of proceedings pending appeal is granted."

Deponent further says that he has examined the Michigan Supreme Court briefs, oral argument or opinion, and that the question as to an excess judgment against the United States does not appear to be present in this case.

Further deponent says not.

Peter P. Gilbert.

Subscribed and sworn to before me this 28th day of March, A. D. 1938.

John W. Babcock,
Notary Public, Wayne County, Michigan.
My commission expires October 26, 1940.

DECISION ON MOTION

(Filed October 18, 1938)

This is a motion by the United States to set aside an amendment of judgment made nunc pro tunc by the Court. The amendment which is attacked decided no issue and merely made definite record of an intended remand to the Probate Court, which that court had already carried out by disallowing a claim of the United States and by determining the question of whether the estate should receive statutory allowance of the excess of its set-off over the disallowed claim, and it is evidently objectionable only because of its fancied effect upon the government's petition for removal.

In its supporting brief the government says that this Court should not prolong the litigation by denying this motion—the asserted prolongation being threatened mandamus—, and I agree that all concerned should make every effort to expedite this aged conflict. The entire record has consequently been checked to determine what effect an order setting the amendment aside would have upon the substantial rights of the parties—I noted in my opinion of February 26th that the amendment was probably unnecessary—, and the answer has been fortunately supplied by the brief of government attorneys in support of this motion.

The amendment which the government wants set aside was made, quoting from my opinion of February 26th, "so that neither party be in position to claim that this court's original judgment (the one amended by the Court), settled the question of affirmative determination one way or another." In its brief, the government has conceded:

"There was no occasion to direct the Probate Court to consider an affirmative judgment against the United States. That could be and was done without this court's admonition."

It is likewise conceded in the same brief:

"This court then (February 8, 1937) remanded the proceeding to the St. Clair Probate Court for further proceedings not inconsistent with the said rulings of this Court and the Supreme Court."

Inasmuch as the government has so plainly conceded of record that the Probate Court on remand had the right and power, without explicit direction, to decide the issue whether the estate should receive an affirmative judgment for the excess owing it, the amendment now serves no necessary or vital purpose. If an order setting it aside will shorten this litigation, such order should certainly now be entered, since the concession amply protects the interests of the estate.

The clerk is therefore directed to enter an order on the Journal setting aside the order of February 28, 1938, that being the order which the government objects to.

Since their last brief will form a part of the record, the Court calls attention to an error attorneys for the government have made on page 7. Final judgment affirming this appeal was entered February 26, 1938, and notice of entry thereof was given all parties by the Court's opinion of the same date.

(Signed) Fred W. George,
Circuit Judge,
31st Judicial Circuit.

Dated: October 18, 1938,
Port Huron, Michigan.

ORDER AMENDMENT BE SET ASIDE

(Circuit Court Journal 27, page 556)

At a general term of the Circuit Court for the County of St. Clair, held at the Court House in the City of Port Huron, said County, on Tuesday, November 22nd, A. D. 1938.

Present: Honorable Fred W. George, Circuit Judge.

It appearing to the Court that the order amending judgment as entered on the journal February 28, 1938, and signed March 1, 1938, now serves no necessary or vital purpose in view of record concessions made by appellant United States, now, therefore, on motion of said appellant, it is adjudged that said order of amendment be and the same is hereby set aside.

Fred W. George,
Circuit Judge.

STATEMENT OF PROCEEDINGS AND FACTS

(Filed.....)

1. In October, 1933, the United States of America, filed a proof of claim for $40,165.40, with interest thereon from April 25, 1933, against the Estate of Sydney C. McLouth, Deceased, in the Probate Court for the County of St. Clair, where the Estate of said decedent was under administration, petitioned for allowance thereof and claimed priority in payment and to preference therefor, pursuant to Section 3466 Revised Statutes of the United States (Section 191, Title 31, U. S. C. A.)

2. The Administrator John C. Shaw and two creditors opposed allowance of the claim and asserted a set-off thereto, but on November 14, 1935, Honorable Clair R. Black, Judge of Probate of said County, acting as Commissioners of Claims, entered an order allowing the claim of the United States of America as a claim of the third class.

3. The administrator and the two creditors appealed from said order to the Circuit Court of said County and on February 8, 1937, Honorable Fred W. George, Circuit Judge of said County, entered a judgment reversing the order of said Probate Court and remanding the case to that Court with direction to disallow the claim of the United States.

4. The claimant United States of America appealed from the said judgment of said Circuit Court to this Court and on September 1, 1937, this Court affirmed the judgment of said Circuit Court (281 Michigan 191).

5. On November 20, 1937, John C. Shaw, administrator of said estate, filed a petition in the Probate Court of St. Clair County, in which the petitioner referred to the proceedings above recited and alleged:

> "That by such judgment of said Circuit Court the estate's set-off as pleaded against said claim was duly adjudged and adjudicated to be a just and proper obligation owing to said estate by United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation by Act of February 11, 1927, 46 U. S. C. A. 810), and as such that it was a proper set-off, within the meaning of Compiler's Section 15682 of the Michigan Compiled Laws of 1929, to said claim of United

States of America, and petitioner alleges that it is the consequent duty of this Court under said last mentioned statute to ascertain and duly allow, in favor of said estate and against said claimant United States of America, the balance in favor of said estate representing excess of such adjudicated set-off over and above such claim of United States of America, especially considering the provisions of the Federal Merchant Marine Act of 1936, by the terms of which all obligations of said Fleet Corporation were unequivocably assumed by said claimant United States of America."

The petition prayed:

"Considering the premises, petitioner prays that this Court, acting in the place and stead of Commissioners of Claims and in pursuance of the mandatory provisions of Compiler's Section 15682 of the Michigan Compiled Laws of 1929, grant statutory judgment of allowance against United States of America and in favor of said estate, of the existing balance due said estate on account of its adjudicated counter cause of action, over and above said claim of United States of America."

6. A copy of the foregoing petition was duly served on the United States Attorney for the District. The petition was duly brought to hearing and it was resisted by the United States on the sole ground that the Probate Court was without jurisdiction to grant an affirmative judgment against the government under the rule of United States v. Eckford, 73 U. S. 484, and similar cases. On December 22, 1937, Judge Black, acting as Commissioners on Claims, entered his "Opinion and Order" holding,—

"that United States of America is indebted to said estate in the sum of $23,628.97, as of December 8, 1937, and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America."

7. United States of America appealed from said judgment of allowance of the Estate's claim to the Circuit Court of St. Clair County and assigned the following reasons for the appeal:

(a) The court does not possess jurisdiction to entertain or adjudicate any claim against the United States, whether asserted by way of recoupment, set-off, counter-claim or cross-bill.

(b) Even if the court possess jurisdiction to adjudicate that the claim asserted by said Estate may be applied pro tanto to extinguish the judgment claim of United States of America against said Estate, the court does not possess jurisdiction to enter a judgment against United States of America for any amount, even though the court ascertains and determines that the claim of said Estate exceeds in amount the claim proved by United States of America.

(c) The claim asserted by said Estate is a claim against the United States Shipping Board Merchant Fleet Corporation (formerly United States Shipping Board Emergency Fleet Corporation) which was a corporation organized under the laws of the District of Columbia, and a claim against said Corporation may not be set-off against a judgment obtained by United States of America in its own right.

(d) The claim of said Estate against the United States Shipping Board Merchant Fleet Corporation (formerly United States Shipping Board Emergency Fleet Corporation), if it has a valid claim, is an unliquidated claim for breach of contract and no evidence has been submitted to this court, acting as Commissioner of Claims, and there is no evidence in the records of this court to prove that the United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation), breached its contract nor that it is indebted to said Estate in any sum whatsoever.

(e) The decision of the Supreme Court of the United States in the case of Ingram Day Lumber Company v. Sydney C. McLouth, (276 U. S. 471), directing that a judgment be entered against that defendant for $42,789.96, which judgment forms the basis of the counter-claim being asserted by said Estate against United States of America in this proceedings, shows affirmatively that the claim sued upon by Ingram Day Lumber Company arose out of a contract that was framed without reference to or knowledge of decedent's contract with the United States Shipping Board Emergency Fleet Corporation and that there was no proof that Ingram Day Lumber Company's contract with decedent was either modified, suspended, cancelled or requisitioned by the United States Shipping Board Emergency Fleet Corporation or by United States of America, from which affirmative showing it necessarily follows that United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant

Fleet Corporation) was under no contractural or other legal obligation to indemnify decedent McLouth or his said Estate against the Ingram Day Lumber Company judgment.

(f) Even if the court possessed jurisdiction to make its order and even though the court did not err in determining that United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) breached its contract, the court erred by including interest on the Ingram Day Lumber Company judgment as a part of the damages for the supposed breach of contract, because the Estate's cause of action (if any) against said Fleet Corporation accrued on January 3, 1928, when the United States Supreme Court directed a judgment against McLouth and it is inequitable that said Fleet Corporation or the United States should be held liable for interest accumulated by reason of laches on the part of the Administrator.

At the instance of the attorneys for the Administrator of said Estate said appeal was calendared for hearing on February 25, 1938. On said date and before said hearing commenced, the attorneys for the United States of America presented in open court to Honorable Fred W. George, Circuit Judge of St. Clair County, a petition for removal of the proceeding to the United States District Court for the Eastern District of Michigan, together with a bond on removal and a draft of an order for removal and proof of service of said papers on the attorneys for the said Administrator. After said petition, bond and order were presented and it appeared

that the petition for removal would be opposed by the attorneys for the Administrator, the attorneys for the United States advised Judge George that if the Court did not approve the order for removal, the United States would not be ready to proceed with the trial of the case in his Court because of the absence of witnesses who were not residents of the County and State and that the United States of America would request a reasonable continuance of the case so that the depositions of such non-resident witnesses could be obtained to be used as evidence in the case.

8. Judge George announced from the bench that he denied the petition for removal and would deny the motion for continuance, unless the attorneys for the United States of America would give the court assurance that the government would not seek to enjoin the further prosecution of the case in the State Courts. The attorneys for the United States of America advised Judge George that they had no authority to give such assurance, but stated to the Court the request for continuance was made in good faith because they were taken by surprise through the Court's refusal to grant the petition for removal. Judge George then announced he would proceed with the case, whereupon the attorneys for the United States of America announced their retirement from the case and withdrew from the Court room.

9. As of February 26, 1938, Honorable Fred W. George filed his "Opinion, Substance of Judgment and Statement of Reasons Therefor" and a copy thereof was sent to the attorneys for the United States of America. Said Opinion, etc., read as follows:

"This is an appeal from an order of the Probate Court ascertaining and allowing the balance of a set-off over and above a claim presented against the estate by appellant. The set-off was upheld In re McLouth's Estate, 281 Mich. 191, and the case was remanded by this court to the Probate Court for denial of the claim and for determination of the question whether the estate was entitled to affirmative order allowing the liquidated balance of its set-off.

"The appeal was regularly placed on the calendar and set for hearing on February 25th, after due notice to appellant. On the date set for hearing appellant appeared by O. P. M. Brown, special counsel, and Peter P. Gilbert, Assistant United States Attorney, and presented a petition to remove the cause. After hearing argument thereon, the court denied the petition as insufficient, and appellant moved for a continuance. Although the specified reason for continuance was need for desired depositions, the court is satisfied that the motion was actually made in order to obtain time to file an injunction bill in the District Court against appellee to restrain him from proceeding further with this appeal. The Government attorneys were offered a thirty-day continuance if they would assure the court that the sole purpose of the continuance was as specified. They refused such assurance and the court ordered the hearing to proceed. Appellant's attorneys thereupon announced their withdrawal from the hearing and left the court room, and appellee moved for affirmance of the appealed Probate Court order.

"The action and announcement of appellant's attorneys must be taken as decision not to prosecute the appeal and the motion for affirmance is therefore granted and the clerk is directed to enter judgment accordingly. Lest my position be misunderstood, however, I advise the District Attorney that he will be allowed a re-opening of the proofs and a new trial if he cares to apply for same within thirty days. I do not want it said that any party has been denied full right to submit proof before me, but I will not grant such a continuance when convinced that the purpose of same is ulterior."

10. On March 15, 1938, due to the absence from the city of Peter P. Gilbert, Assistant United States Attorney, Assistant United States Attorney J. Thomas Smith telephoned to Joseph E. Vincent, Clerk of the Circuit Court of St. Clair County, to ascertain whether or not a judgment had been entered in said case and was informed by Mr. Vincent that no judgment had been entered and the office of the United States Attorney would be notified when it was finally entered. The fact was, however, that a judgment affirming the order of the Probate Court had been entered in the Journal of the Circuit Court but had not been entered in the Calendar of said Court, but this fact was not made known to the attorneys for the United States of America until November 15, 1938, at a conference with Judge George.

11. Meanwhile, on March 24, 1938, which was within the thirty days period the "Opinion", etc. of Judge George had allowed the United States of America for "re-opening of the proofs and a new trial," the United States of America filed in said suit in said Circuit Court, a motion to set aside a portion of the said "Opinion"

etc. filed by Judge George on February 26, 1938, in which nunc pro tunc he amended the record of his judgment in the former appeal proceedings, which had been affirmed by this Court (281 Mich. 191). After a delay due to Judge George's inability to hear the motion because of other judicial duties and assignments, the motion was submitted on briefs and without oral argument on or about October 10, 1938. On October 28, 1938, Circuit Judge George filed his "Decision on Motion", in which he granted the motion to set aside the nunc pro tunc amendment and in said "Decision" Judge George stated:

> "Since their last brief will form a part of the record, the Court calls attention to an error attorneys for the government have made therein on page 7. Final judgment affirming this appeal was entered February 26, 1938, and notice of entry thereof was given all parties by the Court's opinion of the same date."

12. The "error" in the government's brief to which Judge George referred was the following statement:

> "Since the Court has not entered a final judgment on this appeal affirming the order of the Probate Court, although this Court has signified its intention to affirm, it is suggested that this Court consider the significance of the statute above quoted and upon which the Administrator's right to affirmance must depend."

The statement in Judge George's "Opinion" etc. quoted in Paragraph 11 hereof was the first notice or intimation received by the attorneys for the United States of America that a "final" judgment had been

entered in the suit as of February 26, 1938. As hereinbefore stated, the attorneys for the United States of America did not know that the Journal of the Circuit Court contained an entry of the judgment, although the Calendar did not, until November 15, 1938, at a conference with Judge George for settlement of the order on the motion to set aside the nunc pro tunc amendment hereinabove mentioned.

13. The judgment of the Circuit Court of the County of St. Clair entered in the Journal of that Court and from which leave to appeal is now sought, is as follows:

"At a General Term of the Circuit Court for the County of St. Clair, held at the Courthouse in the City of Port Huron in said county, on Saturday, February 26, A. D. 1938.

"In re: The Estate of Sydney C. McLouth, deceased.

"United States of America, Appellant,
v. No. 399-17

"John C. Shaw, Administrator, etc., Appellee.

"On finding by the Court that appellant has failed to prosecute the appeal herein, and on motion of appellee, it is adjudged that the Probate Court order of December 22, 1937, be and the same is hereby affirmed.

"Thereupon Court adjourned until Monday morning, at 9:30 o'clock.

"Read, approved and signed in open Court this 28th day of February, A. D. 1938.

Fred W. George,
Circuit Judge."

CERTIFICATION

(Filed .....)

I do hereby certify that the foregoing is a concise statement of proceedings and facts as far as they are material to this case.

Fred W. George,
Circuit Judge.

Dated at .....

.....1938

CLAIM OF APPEAL

(Filed February 18, 1939)

The United States of America claims an appeal from the judgment entered on February 28, 1938, by Honorable Fred W. George, Circuit Judge for the County of St. Clair, affirming a judgment for $23,628.97, in favor of the Estate of Sydney C. McLouth, Deceased, against the United States of America, entered on December 22, 1937, by the Honorable Clair R. Black, Judge of Probate of the County of St. Clair.

Appellant takes a general appeal pursuant to leave obtained as shown by order of the Supreme Court dated February 2, 1939, allowing this appeal.

United States of America.
By: John C. Lehr,
United States Attorney.
By: Peter P. Gilbert,
Assistant United States Attorney.
By: Oliver P. M. Brown,
Special Assistant United States Attorney.

Dated: February 15, 1939.

NOTICE OF FILING OF CLAIM OF APPEAL

(Filed February 18, 1939)

To: Messrs. Stewart and Black,
Attorneys for the Appellee.

Please take notice that the Claim of Appeal, of which annexed is a copy, was filed in the Office of the Clerk of St. Clair County on February 17, 1939, and that the filing fee of five dollars ($5.00) has been paid.

Peter P. Gilbert,
of Counsel for Appellant.

Dated: February 17, A. D. 1939.

PROOF OF SERVICE

(Filed February 18, 1939)

State of Michigan,
County of Wayne—ss.

Peter P. Gilbert, being first duly sworn, deposes and says that he did serve the claim of appeal and notice, of which annexed are copies, upon Messrs. Stewart and Black, Attorneys for the appellee, by inclosing same in sealed envelope addressed to Messrs. Stewart and Black, Attorneys at Law, 407 First National Bank Building, Port Huron, Michigan, with deponent's return address placed in the upper left hand corner, and by depositing said envelope with said claim of appeal and notice inclosed therein and with postage fully prepaid in the United States Post Office at Detroit, Michigan, on February 17, 1939.

And further deponent sayeth not.

Peter P. Gilbert.

Subscribed and sworn to before me this 17th day of February, A. D. 1939.

John C. Ray,
Notary Public, Wayne County, Michigan.
My commission expires March 3, 1941.

ORDER FOR REMAND

(Filed .....)

At a session of said court held in the Federal Building at Detroit, Michigan, this 21st day of February, A. D. 1939.

Present: Hon. Arthur F. Lederle, District Judge.

The motion to remand filed on behalf of John C. Shaw, Administrator de bonis non of the Estate of Sydney C. McLouth, Deceased, appellee above named, having come on to be heard, and the court being fully advised in the premises,

It is ordered that the said motion to remand be, and the same is hereby granted, and the above entitled cause is hereby remanded from this court to the Circuit Court for the County of St. Clair, Michigan.

Arthur F. Lederle,
District Judge.

CERTIFICATE OF CIRCUIT JUDGE

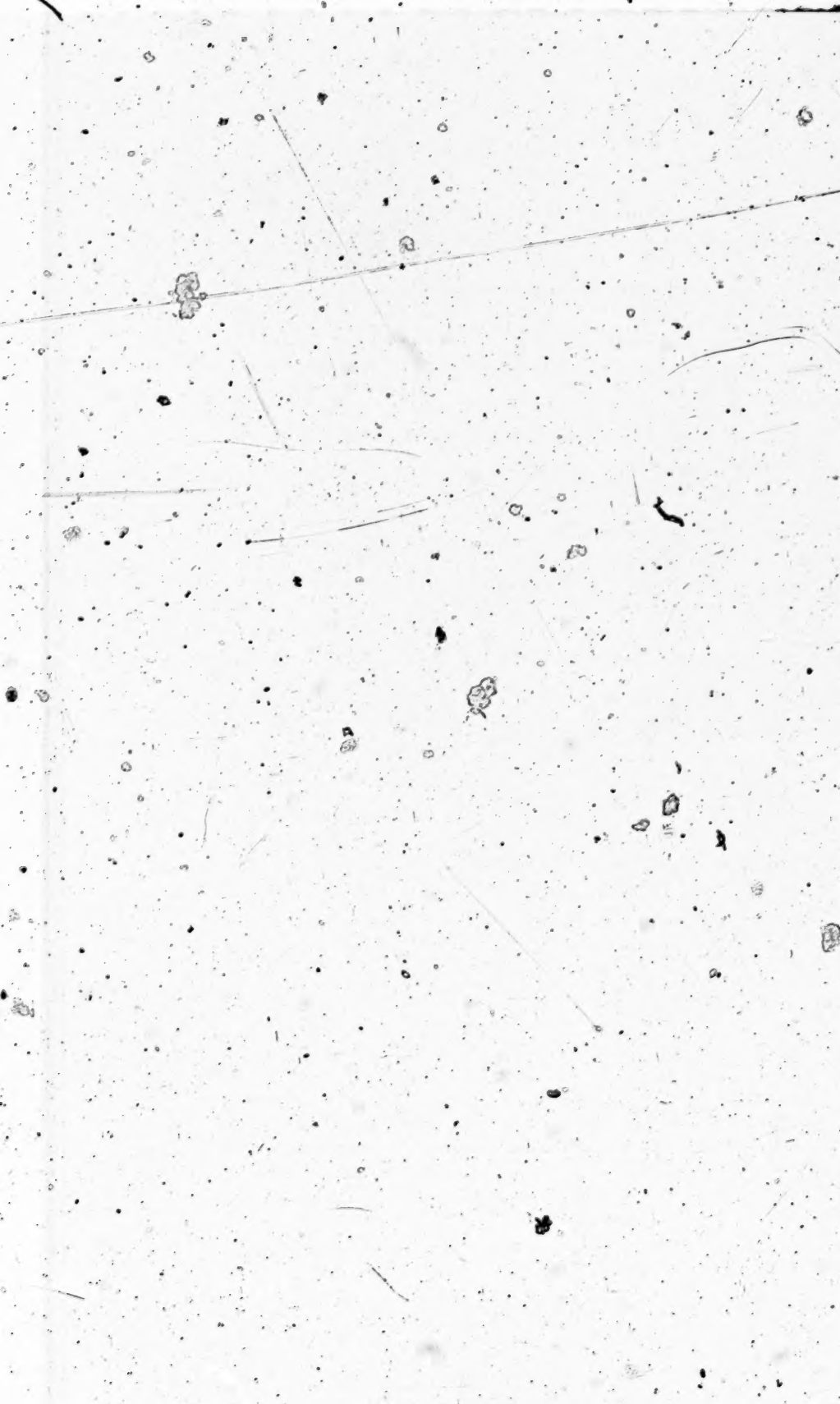
(Filed March 10, 1939)

I, Fred W. George, Circuit Judge in and for the County of St. Clair, State of Michigan, certify that, pursuant to the statute and court rules in such case made and provided, I have settled and signed the foregoing record, containing the material pleadings and other proceedings in said cause, and I certify that the foregoing contains substantially all of the necessary material pleadings, orders and other proceedings for a review by the Supreme Court of the questions of law and fact involved.

I further certify that, on motion duly made and consented to by counsel, the time for filing the record has been extended to March 11, 1939.

Fred W. George,
Circuit Judge.

Dated: March 10, 1939.



40443

PARTIES IN THE MATTER OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN C. SHAW, ADMINISTRATOR, APPELLEE

Appeal from St. Clair

1939

Plaintiff's attorneys, John C. Lehr, Peter P. Gilbert.
Defendant's attorneys, Stewart and Black.

Jan. 30—Application for delayed appeal filed.
Feb. 2—Application granted.
Mar. 13—Note of argument filed.
" 30—Record on appeal filed.
Apr. 11—Continued.
" 17—Note of argument filed.
May 31—Probate Court calendar entries filed.
" 19—Motion to include record in former case filed.
" 22—Brief in opposition filed.
June 1—Motion to strike brief filed.
" 7—Motion submitted with principal case (to include record).
" 8—Motion denied (to include record).
" "—Argued and submitted.
" 24—Certified copy of Probate Court order filed.
Sept. 5—Motion to strike brief denied.
" "—Affirmed, costs, remanded.
" 20—Record returned to Court below.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the second day of February, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable HENRY M. BUTZEL, Chief Justice; HOWARD WIEST, GEORGE E. BUSHNELL, EDWARD M. SHARPE, WILLIAM W. POTTER, BERT D. CHANDLER, WALTER H. NORTH, THOMAS F. MCALLISTER, Associate Justices.

40443

IN THE MATTER OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN C. SHAW, ADMINISTRATOR, APPELLEE

In this cause an application is filed by appellant for leave to appeal from the judgment of the Circuit Court for the County of St. Clair, and nothing in opposition thereto having been filed by appellee and

due consideration thereof having been had by the Court, It is ordered that the application be and the same is hereby granted.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eighth day of June, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable HENRY M. BUTZEL, Chief Justice; HOWARD WIEST, GEORGE E. BUSHNELL, EDWARD M. SHARPE, WILLIAM W. POTTER, BERT D. CHANDLER, WALTER H. NORTH, THOMAS F. MCALLISTER, Associate Justices.

40443.

UNITED STATES OF AMERICA
vs.
JOHN C. SHAW, ADM'R.

This cause coming on to be heard is argued by Mr. Brown for the appellant and by Mr. Black for the appellee and is duly submitted.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eighth day of June, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable HENRY M. BUTZEL, Chief Justice; HOWARD WIEST, GEORGE E. BUSHNELL, EDWARD M. SHARPE, WILLIAM W. POTTER, BERT D. CHANDLER, WALTER H. NORTH, THOMAS F. MCALLISTER, Associate Justices.

40443

IN THE MATTER OF ESTATE OF MCLOUTH

In this cause a motion is filed by appellant for permission to file in connection with this appeal a copy of the printed record in Calendar No. 39487, and a brief in opposition thereto having been filed by appellee, and due consideration thereof having been had by the Court, it is ordered that the motion be and the same is hereby denied.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifth day of September, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable HENRY M. BUTZEL, Chief Justice; HOWARD WIEST, GEORGE E. BUSHNELL, EDWARD M. SHARPE, WILLIAM W. POTTER, BERT D. CHANDLER, WALTER H. NORTH, THOMAS F. MCALLISTER, Associate Justices.

40443

IN THE MATTER OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN C. SHAW, ADMINISTRATOR, APPELLEE

In this cause a motion is filed by appellant to strike the brief heretofore filed herein by appellee opposing motion for diminution of record, and papers in opposition thereto having been filed by appellee, and due consideration thereof having been had by the Court, it is ordered that the motion be and the same is hereby denied.

State of Michigan Supreme Court

IN RE THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF ESTATE OF SYDNEY C. McLOUTH, DECEASED, APPELLEE

Before the Entire Bench

NORTH, J. Except as hereinafter noted the factual background of this case will be found in Re McLouth's Estate, 281 Mich. 191, hereinafter referred to as a former appeal in this litigation. From the facts there stated it appears a claim against the McLouth estate in favor of the Ingram-Day Lumber Company was finally reduced to judgment in the supreme court of the United States: Ingram-Day Lumber Co. v. McLouth, 275 U. S. 471. The date of this judgment was January 3, 1928. Pending this litigation in the federal court, McLouth had died in 1923. With accrued interest and costs the adjudicated claim was ultimately allowed in the probate court of St. Clair County against the McLouth estate in the sum of $58,089.04. For reasons noted in our former decision and because of an act of Congress (Merchant Marine Act, 49 Stat. 1987; U. S. C., Title 46, Sec. 1113; quoted in margin hereof) appellee herein asserts that the United States government as an assignee or successor to all the rights and liabilities of the United States Shipping Board Emergency Fleet Corporation (herein designated as the Fleet Corporation) is obliged to reimburse or indemnify the McLouth estate as to its liability on this $58,089.04 claim. At the outset we may note, as held on the former appeal, we are of the opinion that appellee's contention in this particular is sound.

Another claim against the McLouth estate in the amount of $40,165.48 in favor of the United States Government was reduced to judgment in the federal courts. Shaw v. United States, 75 Fed. (2d) 175. This adjudicated liability was also filed as a claim in the St. Clair probate court proceedings in the McLouth estate. Later the administrator of the estate succeeded in establishing his contention of right to satisfy this latter liability of the estate by having it set off or allowed pro tanto against the government's liability to reimburse the estate for the Ingram-Day Lumber Co. claim of $58,089.04. This was the controversy decided in Re McLouth Estate, supra.

After our former decision the administrator, on November 20, 1937, petitioned the probate judge, acting in the place of commissioners on claims, for the ascertainment and allowance of the excess of the Ingram-Day Lumber Company claim over and above the government's claim as a claim in favor of the McLouth estate and against the United States Government. The uncontroverted difference in amount between these claims, allowance being made for accrued interest, is $23,628.97. By reason of the above-noted judgments, as embodied in this record, the amount of the damage to the estate was fixed or liquidated in case of failure of performance of the indemnity settlement agreement, (outlined in our former decision) which failure is shown to have occurred. From the probate court's order granting the administrator's petition and allowing this claim in the amount of $23,628.97 as of December 8, 1937, in favor of the estate, the government appealed to the circuit court, on hearing in the circuit court the allowance of the claim was affirmed; although this result instead of being reached after a full hearing on the merits was reached because of a seeming abandonment of the proceedings in the circuit court by the government's representatives. From the judgment entered in the circuit court the government has brought the instant appeal. As stated in appellant's brief:

"But a new question is presented on this appeal, namely, whether the Probate Judge, acting as Commissioners of Claims, possessed jurisdiction to allow an affirmative judgment against this Appellant—a question that was not presented on the former appeal (i. e., the appeal in Re McLouth Estate, supra).

"Appellant's challenge to the jurisdiction of the Probate Judge rests not alone upon the immunity of the sovereign, but also rests upon the contention that the same statute that created the right to apply a set-off in favor of the Estate and provided the remedy, also imposed a condition which affected the existence of the right and prohibited the special tribunal in which the right might be asserted from giving any consideration to a set-off which was invalidated by the condition imposed, i. e., if the set-off was barred by the Michigan Statute of Limitations. This last contention might have been but was not raised on the former appeal."

At the oral argument appellant definitely took the position that the only questions presented by this appeal are:

I. Did the probate court have jurisdiction to allow the claim of $23,628.97 in favor of the estate and against the government?

II. As to this claim, has there been due process of law so that the government is bound by the adjudication?

It is appellant's contention that each of these questions should be answered in the negative.

In presenting its contention that the probate court was without jurisdiction to allow the claim of $23,628.97 against the government, appellant in its brief has framed the issue as follows:

"Since decedent's claim against the Emergency Fleet Corporation for breach of contract accrued to decedent or to decedent's estate more than six years prior to the date decedent's administrator exhibited said claim in off-set to the claim of appellant against the estate and hence was barred by limitations (Section 13976, Compiled Laws of Michigan, 1929) did the Probate Judge acting either as Commissioners of Claims or as a Probate Court, possess jurisdiction to allow the claim exhibited in favor of the estate, as a set-off or otherwise, in view of the prohibition in Section 15682 (Compiled Laws of Michigan, 1929) against allowance of any claim barred by the statute of limitations?"

We quote the statute under which the probate court asserted its jurisdictional right to adjudicate the issue.

"When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be; *but no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate, as set-off or otherwise.*" C. L. 1929, Sec. 15, 682; Stat. Ann. 27.2829.

Jurisdiction

The issue as to jurisdiction is presented by the italicized portion of the above-quoted statute. Appellant contends that (1) since its obligation to pay the Ingram-Day Lumber Company claim had outlawed, the probate court, acting solely under authority of the statute just quoted, was without jurisdiction to render judgment in favor of the estate; and (2) that the question of jurisdiction may be raised at any time pending final adjudication. As to the first of the above contentions appellant cites Davis v. Mills, 194 U. S. 451, Texas Cement Co. v. McCord, 233 U. S. 157 and numerous other cases. The proposition is this:

If a statute creating a new right of action contains within itself limitation of jurisdiction over subject matter or express limitation of time within which the new right of action must be presented, failure of compliance with such limitation defeats the right of action.

It is true that the quoted statute vests commissioners on claims with power to adjudicate set-offs, which power would not exist except

for the statutory provision; but subjecting and limiting the exercise of this power by mere reference to our general statute of limitations, which is commonly applicable to all courts, did not add to or constitute in the statute a jurisdictional element. This provision only specifies that commissioners on claims in deciding set-off issues, like our courts, are governed by the provisions of our general statute of limitations. Without this directory provision the operation of the statute would have been the same. A like provision is not contained in the statutory provisions for general hearing of claims by commissioners, but nonetheless a claim barred by the statute cannot be allowed by commissioners. A special or distinct limitation of time for asserting a set-off before commissioners is not embodied in this statute; such, for example, as the express limitation of two years for bringing a statutory action under the blue sky law. See Bigelow v. Otis, 247 Mich. 409.

"A positive distinction seems to be made between cases in which the limitation of time for bringing suit is contained in the statute which creates the liability and right of action and general statutes of limitations of rights of action existing under other statutes or under the common law." Bement v. Grand Rapids, Etc., R. Co. 194 Mich. 64, 68.

We think it follows that appellant can claim in this proceeding the benefit of the statute of limitations, if at all, only in the same sense it might in an ordinary law suit.

Defense of the Statute of Limitations. Except as incident to its challenge to the jurisdiction of the probate court, we do not understand that appellant in this appeal relies upon the statute of limitations as a defense to the estate's claim. Nor could it do so. Such a claim was not made in the probate court so far as disclosed by this record and it was not assigned as a reason in support of the appeal to the circuit court. It cannot now be injected as an issue on appeal to this court. The proceedings now before us originated in the probate court, having been instituted in that tribunal by appellant. When litigation instituted in the probate court is taken by appeal or certification to the circuit court, the latter court exercises appellate jurisdiction only and is restricted to the issues presented by reasons assigned in support of the appeal. C. L. 1929 Sec. 15. 958; Stat. Ann. 27.3158. In Re Beers, 148 Mich. 300; In Re Ward's Estate, 152 Mich. 218; In Re DeHaan's Estate, 169 Mich. 146; In Re Broffee's Estate, 206 Mich. 107; In Re Murphy's Estate, 219 Mich. 70; In Re Reid's Estate, 248 Mich. 860. If there was any objection to the estate's counterclaim growing out of the statute of limitations it should have been raised before the commissioners or on the appeal to the circuit court. Slaughin v. Hooper, 40 Mich. 503; Andrews v. Osborn, 159 Mich. 77.

It follows that the question of the effect of the statute of limitations, if any, on the controversy brought to us by this appeal is not open to consideration.

Jurisdiction to Render Affirmative Judgment—Sovereign Immunity. As a second challenge to the jurisdiction of the probate court and the circuit court, appellant asserts:

"The probate judge did not possess jurisdiction to enter an affirmative money judgment against this appellant."

This contention is based upon the assertion of the government's sovereign immunity from suits in state and federal courts. We quote from appellant's brief:

"The United States cannot be sued in any court, Federal or State, without express authority of Congress, and when it consents to be sued the act is jurisdictional and must be strictly followed (U. S. v. Pfitsch, 256 U. S. 547). 'Its immunity recognizes no distinction between cross bills and original bills, or between ancillary suits and original suits, but extends to suits of every class (Ill. Cent. R. R. Co. v. Public Utilities Comm., 245 U. S. 493). There is no difference between recoupment, counterclaim, and set-off so far as invoking jurisdiction is concerned (Merchants Heat & L. Co. v. Clow & Sons, 204 U. S. 286)."

There is some seeming conflict in federal decisions as to jurisdiction of state or federal courts to render affirmative judgments against the government in suits wherein the government has voluntarily appeared. Appellant cites Illinois Cent. R. R. Co. v. Public Utilities Comm., 245 U. S. 493, and quotes the following:

"No doubt there are situations in which a cross bill against an ordinary suitor may be considered and dealt with in virtue of the jurisdiction over the principal suit, even though as an original bill it could not be entertained (see Denver v. New York Trust Co., 229 U. S. 123, 135, and cases cited); but it is otherwise where the cross bill is against the United States, for no suit against it can be brought without its consent given by law. Its immunity recognizes no distinction between cross bills and original bills, or between ancillary suits and original suits, but extends to suits of every class." (Citing numerous cases.)

But the applicability of the above quotation to the instant suit is seriously impaired, if not wholly nullified, by the fact that the United States was not originally a party to the Illinois Central Railroad Company case; but instead an unsuccessful attempt was made to interplead the United States. The instant case is decidedly different in that the government has voluntarily brought its claim into the state courts. A like distinguishing feature exists in the recent federal case cited in appellant's reply brief. United States v. State of Minnesota, 305 U. S. 382. In this suit the government was made a party defendant. It was not a voluntary party; but instead it appeared specially in the federal court and moved to dismiss on the ground that it had not consented to be sued. Its motion was granted.

In others of the cases cited by appellant affirmative judgment against the government based on set-off or counterclaim was denied because of controlling statutory provisions which restricted the juris-

diction of the forum in which suit was brought. See United States v. Nipissing Mines Co., 206 Fed. 431. We forego specifically pointing out the quite obvious inapplicability of numerous federal decisions cited by appellant because of our understanding that the more recent federal decisions hold adversely to appellant's contention that state or federal courts do not have jurisdiction to render affirmative judgments against the United States, even in cases to which the government has voluntarily made itself a party. In the instant controversy the government as the moving party voluntarily appeared in the probate court and asserted a claim for upwards of $40,000 against the McLouth estate. It is now faced with a counterclaim in the same proceedings. On the former appeal Mr. Justice Butzel, speaking for the Court, said:

"The tendency of the United States Supreme Court is to allow a set-off against the government when the latter brings suit." In re McLouth's Estate, supra.

The following from American Propeller & Manfg. Co. v. United States, 300 U. S. 475; 57 Sup. Ct. 521, was quoted in our decision of the former appeal:

"We have said (United States v. The Thekla, 266 U. S. 328, 339-341 (45 Sup. Ct. 112).): 'When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it. * * * the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest.' If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

Also in deciding the former appeal we cited and quoted from United States v. National City Bank of New York, 83 Fed. (2d) 236; 106 A. L. R. 1235. Following this decision by the circuit court of appeals, the federal supreme court denied certiorari (see 299 U. S. 563). The decision is so controlling in the instant appeal that we again quote from it herein:

"The next question is whether sovereign immunity from suit bars this set-off. Set-offs against the sovereign United States have been allowed where it was plaintiff. United States v. Wilkins, 6 Wheat. (19 U. S.) 135; United States v. MacDaniel, 7 Pet. (32 U. S.) 1; United States v. Kimball, 101 U. S. 726; United States v. Ringgold, 8 Pet. (33 U. S.) 150. The supreme court has held, independently of any statute, that, where the sovereign brings a suit, it submits to the application of the same principles which govern private suitors. The Paquete Habana, 189 U. S. 453 (23 Sup. Ct. 593); The Nuestra Senora de Regla, 108 U. S. 92 (2 Sup. Ct. 287); The Siren, 7 Wall. (74 U. S.) 152. In The Siren, supra, the principle of a

sovereign plaintiff's submission to jurisdiction was held subject to the qualification that no affirmative judgment could be entered, but in The Nuestra Senora Case, supra, an affirmative judgment against a sovereign was upheld, and the previous qualification of the right against the government was removed. This was followed in 1902 in The Paquete Habana, supra, and later reaffirmed in United States v. The Thekla, 266 U. S. 328 (45 Sup. Ct. 112).

"If a sovereign state goes into court seeking its assistance, it is in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction in respect to a set-off or counterclaim properly assertable as a defense in a similar suit between private litigants. The Gloria, 286 Fed. 188. See French Republic v. Inland Navigation Co., 263 Fed. 410, 411. Where a sovereign voluntarily litigates, he must play the role of a litigant like any other suitor and abide by the consequences. See Richardson v. Fajardo Sugar Co., 241 U. S. 44 (36 Sup. Ct. 476); People of Porto Rico v. Ramos, 232 U. S. 627 (34 Sup. Ct. 461); Clark v. Barnard, 108 U. S. 436, 447, 448 (2 Sup. Ct. 878). It is now established that, where a sovereign comes into court, he is unarmed with immunity as against the rights of a defendant who has a proper set-off to his claim."

In its still more recent decision the supreme court of the United States has said:

"By voluntarily appearing in the role of suitor it [a foreign sovereign] abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. United States v. The Thekla, 266 U. S. 328, 340, 341; United States v. Stinson, 197 U. S. 200, 205; The Davis, 10 Wall. 15; The Siren, 7 Wall. 152, 159." Guaranty Trust Co. v. United States, 304 U. S. 126, 134.

The extent to which the federal supreme court by its recent decisions has indicated a proneness to minimize or restrict sovereign immunity from suit is strikingly disclosed by its very recent decision in Keifer and Keifer v. Reconstruction Finance Corp., decided February 27, 1939. See United States Supreme Court Advance Opinions, Vol. 83, Pg. 512.

In the light of the above cited decisions, appellant's contention that the probate court did not possess jurisdiction to enter an affirmative judgment against it is not tenable. We are not in accord with appellant's contention that the law as announced in the above cited cases should be confined in its application to proceedings in admiralty. Neither the context of the decisions nor the reasoning therein employed justifies appellant's contention. It may be noted that neither the American Propeller Company case, nor the National City Bank case, nor the Guaranty Trust Company case, from each of which we have just above quoted, involves an admiralty controversy.

"There is no difference between a libel in rem, under which a ship is arrested, and an action in personam against an agent of the sovereign." Kunglig Jarnvagastyrelsen v. Dexter & Carpenter, 300 Fed. 891.

On the question of jurisdiction we conclude that since the United States of its own volition submitted its claim against the McLouth estate to the courts of this state, its status as a litigant here is no different than that of an individual who has submitted to the jurisdiction of our state courts. In the exercise of jurisdiction thus acquired, sovereign immunity is properly disregarded; and as to the asserted counterclaim the court had full power to make final determination of the rights of the litigants including power to render affirmative judgment against the federal government. That the State court may be powerless to enforce its judgment against the United States by execution is beside the question as to the court's jurisdiction as a final arbiter of the parties' rights. United States v. Eckford, 73 U. S. 484. Appellee's position as to this phase of the case is stated in its brief as follows:

"Appellee does not claim that this judicial determination by the probate court constitutes a judgment against the Fleet Corporation within the meaning of the last sentence of Sec. 203, 49 Stat. 1987 (46 U. S. C. A. Sec. 1113). The probate court's order is a judicial ascertainment that, on striking a balance of proper demands, the United States as claimant is indebted to the estate (a result and determination which is permitted and dictated by the Eckford case (73 U. S. 484) as well as by our probate court set-off statute), and the adjudicated obligation must consequently be paid, if at all, by special congressional act."

Was There Lack of Due Process? Appellant further contends that the judgment for $23,628.97 entered in the probate court and affirmed on appeal to the circuit court of St. Clair county violated the due process clauses of the state and federal constitutions. The basis of this contention is that this affirmative judgment in favor of the McLouth estate arises out of the contractual obligation of the Fleet Corporation, not out of any commitment of the United States; and appellant asserts there has never been an adjudication in any forum fixing the liability of the Fleet Corporation or the United States for this contractual undertaking of the corporation or for the breach thereof. But this contention is not tenable. In the earlier proceedings between these parties which went to final adjudication on the former appeal to this court, it was determined that the government had placed itself in the shoes of the Fleet Corporation. Throughout the transactions giving rise to this litigation the government has been the principal and the Fleet Corporation merely its self-created agency. It now appears that by voluntary congressional action (Merchant Marine Act, 49 Stat. 1987; U. S. C., Title 46, Sec. 1113) the United States dissolved the Fleet Corporation, took over all of its assets, and assumed its liabilities. That appellant is

liable for the undertakings of the Fleet Corporation embodied in its indemnifying contract with McLouth, was adjudicated on the former appeal. This determination was essential to decision of that appeal.

By reason of our former decision, such is now the law of this case. It is in the proceedings had in the courts of this state, to which the government became a voluntary party, that the government has had its day in court. The adjudication adverse to the government was in a proceeding provided by the statute in this state (C. L. 1929, Sec. 15682; Stat. Ann. 27.2829). The adjudicating tribunal had power to hear and determine unliquidated claims. Willard v. Fralick, 31 Mich. 431; Ford v. Maney Est., 251 Mich. 461; In Re Oldman's Estate, 264 Mich. 32. Hence there was full compliance with the due process requirements of both the state and federal constitutions.

Decision herein is only as to the right of appellee to an affirmative judgment fixing the amount of the excess of the estate's claim against the United States over and above its judgment for $40,165.48 against the McLouth estate. The right to set-off pro tanto to the extent of the government's judgment was finally adjudicated in the former appeal decided in 281 Mich. 191. Other questions discussed in the briefs are not decisive of the instant appeal nor essential to decision, and their consideration herein is not deemed necessary. The judgment entered in the circuit court is affirmed and the case remanded for certification to the probate court. Costs to appellee.

(Signed) WALTER H. NORTH.
THOMAS F. MCALLISTER.
BERT D. CHANDLER.
EDWARD M. SHARPE.
HOWARD WIEST.
HENRY M. BUTZEL.
GEORGE E. BUSHNELL.
WILLIAM W. POTTER.

[Endorsed:] Filed Sept. 5, 1939. Jay Mertz, Clerk, Supreme Court.

Note to be Printed in Margin

"The United States Shipping Board Merchant Fleet Corporation shall cease to exist and shall stand dissolved. All the records, books, papers, and corporate property of said dissolved corporation shall be taken over by the Commission. All existing contractual obligations of the dissolved corporation shall be assumed by the United States. Any suit against the dissolved corporation pending in any court of the United States shall be defended by the Commission (created by this act) upon behalf of the United States, under the supervision of the Attorney General, and any judgment obtained against the dissolved corporation in any such pending suit shall be reported to Congress in the manner provided in section 226, title 31,

United States Code, for reporting judgments against the United States in the Court of Claims." Section 203 (a) of the Merchant Marine Act, 1936 (49 Stat. 1987; U. S. C. Title 46, Sec. 1113).

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifth day of September, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable HENRY M. BUTZEL, Chief Justice, HOWARD WIEST, GEORGE E. BUSHNELL, EDWARD M. SHARPE, WILLIAM W. POTTER, BERT D. CHANDLER, WALTER H. NORTH, THOMAS F. McALLISTER, Associate Justices.

40443

IN THE MATTER OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN C. SHAW, ADMINISTRATOR, APPELLEE

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of St. Clair and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR. Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of St. Clair be and the same is hereby in all things affirmed, and that the appellee do recover of the appellant his costs, to be taxed, and that he have execution therefor, and the cause remanded for certification to the Probate Court.

Supreme Court of the State of Michigan

40443

IN THE MATTER OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN C. SHAW, ADMINISTRATOR, APPELLEE

IN THE SUPREME COURT, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all the proceedings had and determined in the above entitled cause by said Supreme Court, including

the written decision and reasons therefor, signed by the Justices of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and that it is a true transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this twenty-fourth day of November, in the year of our Lord, one thousand nine hundred and thirty-nine.

JAY MERTZ,
By HUGH H. CARPENTER,
Deputy Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1939

Supreme Court of the United States

Order allowing certiorari

Filed January 8, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.